ABROMARITIME TECHNICAL SERVICE

v.

AZCO SUPPLY (M) SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. C4737-85]
21 NOVEMBER 1990

CIVIL PROCEDURE: *Injunction - Mareva - Exparte - Good arguable case - Balance of convenience - Principles.*

The plaintiff company ATS is a contractor and supplier to the petroleum industry of Malaysia and to the Government Departments in Malaysia.

The 1st defendant D1 is a company registered in Malaysia and the 2nd and 3rd defendants, D2 and D3, are the promoters of D1 and also the directors of ATS. D4 is also a shareholder of the plaintiff company.

During the period from 26 July 1984 to 28 February 1985, a number of ATS cheques totalling RM494,172.51 were drawn either in cash or in favour of the D3 or D4 or a third party. ATS alleges that D3 and D4 have wrongfully converted, conspired and fraudulently cheated, embezzled and misappropriated the said sums. According to ATS, as a result of the conspiracy, ATS has suffered loss and damage and loss of reputation.

ATS applied and obtained an *ex parte* for Mareva injunction against the defendants.

The defendants applied to set aside the Mareva injunction.

Held:

[1] Based on the *Bank Bumiputra v. Lorrain Osman & Ors.* case, the Court allowed ATS's Counsel to introduce an affidavit on the memorandum and articles of association although these memorandum and articles of association, which were available when the *ex parte* application was made, were not produced at the *ex parte* application.

[2] The explanation by the defendants that the payments made as loans to D1 was totally unacceptable.

[3] There was no minutes of the general meeting which were exhibited by D4 to show that these payments were for his directors' fees, salaries and bonus.

[4] The Court was satisfied that:

(i) the ATS had a good arguable case;

(ii) the defendant had assets within the jurisdiction and

(iii) there was evidence that the defendant would remove the assets before the judgment was satisfied.

[5] The balance of convenience was in favour of continuing the Mareva injunction.

[Defendants' application dismissed.]

Cases referred to:
Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Osman & Ors. [1985] CLJ (Rep) 409
Aspatra Sdn. Bhd. & 21 Ors. v. Bank Bumiputra Malaysia Bhd. & Anor. [1988] 1 MLJ 97
PacAsian Services Pte. Ltd. v. European Asian Bank AG [1989] 3 MLJ 385
Bank Islam Malaysia Bhd. v. Tinta Press Sdn. Bhd. & Ors. [1986] 1 MLJ 256
Tinta Press Sdn. Bhd. v. Bank Islam Malaysia Bhd. [1987] CLJ (Rep) 396

For the plaintiff - P.S. Gill; M/s. Gill & Tang
For the 1st and 2nd defendants - Andrew Ho Hock Lye; M/s. Sya, Ho Sia & Associates
For the 4th defendants - Kwok; M/s. Kwok & Co.

JUDGMENT

Zakaria Yatim J:

There are two applications filed by the first and second defendants (first application) and by the fourth defendant (second application) respectively. In both these applications, the defendants are seeking the order of the Court to set aside an injunction granted against them. The injunction was obtained *ex parte* by the plaintiff.

The *ex parte* order obtained by the plaintiff *inter alia* states:

It is hereby Ordered as follows:

(a) That, the defendants whether by; themselves, their servants and or agents or howsoever otherwise be restrained until further order, and an injunction is hereby granted restraining them from removing from the jurisdiction or in any way disposing of, transferring away or dealing with the assets of each of them whether moveable or immovable within the jurisdiction except to deliver and supply goods that they are contractually obliged to supply and in particular not to transfer dispose of or deal with any of the bank accounts of the defendant maintained with any of the banks namely the Kwong Yik Bank Berhad, Chase Manhattan Bank NA, Bank Bumiputra Malaysia Bhd., Malayan Banking Berhad, United Asian Bank Berhad, Citibank NA, Lee Wah Bank Ltd., Overseas Union Bank Berhad, Pacific Bank Berhad, United Malayan Banking Berhad Corporation, The Standard Chartered Bank Ltd., The Hongkong and Shanghai Banking Corporation, Perwira Habib Bank Berhad, The Overseas Chinese Banking Corporation, Hock Hua Bank Bhd., and Malaysian French Bank and in particular (i) the 3rd defendant's account at Hock Hua Bank Bhd. A/c No. 01-05210-1 and the Hongkong & Shanghai Banking Corporation, Bukit Bintang Branch A/c No. 305-000580-001 (ii) the 4th defendants's account at Lee Wah Bank A/c No. 344313-462-8 and at Citibank NA A/c 0050373029 (iii) the 4th defendant's rights interest title under the sale agreement dated 18 May 1982 to all that piece of land described and known as Lot T1/2292 Taman Sri Muda, Shah Alam.

Before the hearing of the two applications the above order was varied, on the application of the fourth defendant, to allow the fourth defendant to pay the Income Tax Department the amount of RM3,482.20 and to pay the hire purchase payment of RM2,000 to one UNE Holdings Sdn. Bhd., out of the fourth defendant's bank accounts as stated in the above order.

It will be noted from the *ex parte* order quoted above, the plaintiff has obtained a Mareva injunction against the four defendants.

The plaintiff is a company incorporated in Malaysia having its place of business at Wisma

Hong Bee, 93-C Jalan Bukit Bintang, Kuala Lumpur. It carries on business as a contractor and supplier to the petroleum industry of Malaysia and to the Government Departments in Malaysia. The first defendant is also a company incorporated in Malaysia having its place of business at 142-B Jalan Bukit Bintang, Kuala Lumpur. The second and third defendants are the promoters of the first defendant. The third and fourth defendants were at all material times the directors of the plaintiff company. The fourth defendants is a shareholder having one share of RM1 with the plaintiff company.

The plaintiff's case is that in early April 1985, the plaintiff's Managing Director realised that the third and fourth defendants had failed to turn up for work and were making various excuses for their absence from work. The managing director caused an audit investigation to be carried out and other searches. As a result of the investigation and searches certain facts came into light:

Sometime in December 1984, the third and fourth defendants as directors of the plaintiff company instructed a firm of secretaries, Messrs. H.Y. Goh & Co., to incorporate the first defendant company. On 7 January 1985, the third and fourth defendants, without the authority of the board of directors and the managing director of the plaintiff company, caused to be paid to the said secretaries a sum of RM6,000 vide Cheque No. 508922 drawn on the plaintiff's Lee Wah Bank account towards the incorporation fees. The first defendant company was incorporated on 30 January 1985. The said cheque was signed by the third and fourth defendants.

On 10 January 1985, the third and fourth defendants caused to be issued the plaintiff's cheque drawn on Lee Wah Bank vide cheque No. 508929 for the sum of RM4,400 to Regent Intan Sdn. Bhd., being rent deposit for the first defendant's office at 142-B, Jalan Bukit Bintang, Kuala Lumpur. On 18 January 1985 they issued another cheque No. 508939 for the sum of RM3,700 to Regent Intan Sdn. Bhd., being deposit for one month's rent, water and electricity deposits. The said cheques had been drawn and signed by the third and fourth defendants and issued without the authority of the board of directors and the managing director of the plaintiff.

The third and fourth defendants also issued cheques drawn on the plaintiff's Bank Bumiputra Malaysia Bhd., account *vide* Cheque No. 683792 of RM2,240 and cheque No. 683776 for RM3,700 to purchase equipment for the first defendant. The two cheques were signed by the third and fourth defendants without the authority of the plaintiff's board of directors and the managing director.

On 28 January 1985, the fourth defendant caused to be issued a letter to Messrs. Thompson, Byron, Jackson & Co., in Singapore releasing the agency held by the plaintiff together with the three contracts - one with Petronas Dagangan Sdn. Bhd., one with Shell Malaysia Trading Sdn. Bhd., and one with Esso Malaysia. The third and fourth defendants induced Messrs. Thompson, Byron, Jackson & Co., to transfer the said agency to the first defendant company as a result of which the first defendant took over contracts valued at a sum of RM30,612 with Shell Malaysia Trading Sdn. Bhd. and another contract valued at RM12,400 with Esso Malaysia for supply of goods. The release of the said agency by the third and fourth defendants was without the authority of the board and the managing director of the plaintiff, as a result of which the plaintiff suffered loss and damage.

During the period from 26 July 1984 to 28 February 1985, the third and fourth defendants

caused to be drawn a number of the plaintiff's cheques totalling RM494,172.51 either in cash or in favour of the third defendant or the fourth defendant or a third party. The plaintiff alleges that the third and fourth defendants have wrongfully converted, conspired and fraudulently cheated, embezzled and misappropriated the said sums. According to the plaintiff as a result of the conspiracy, the plaintiff has suffered loss and damage and loss of reputation.

During the hearing of the applications, Mr. P.S. Gill, Counsel for the plaintiff sought to introduce an affidavit exhibiting the memorandum and articles of association of the plaintiff. Both Mr. Andrew Ho, Counsel for the first and second defendants and Mr. Kwok, Counsel for the fourth defendant objected to the affidavit being admitted. The said memorandum and articles of association were available at the time when the *ex parte* application was made but it was not produced. In introducing the new affidavit, Mr. Gill relied on the decision in *Bank Bumiputra Malaysia Bhd. & Anor. v. Lorrain Osman & Ors.* [1985] CLJ (Rep) 409. In that case I said at p. 415:

> Even if the evidence was available at the time of the *ex parte* applications for Mareva injunctions or an Anton Piller order but the evidence was not presented to the Judge then, in my opinion the plaintiff is not estopped from introducing such evidence during the *inter partes* proceeding.

See *Aspatra Sdn. Bhd. & 21 Ors. v. Bank Bumiputra Malaysia Bhd. & Anor.* [1988] 1 MLJ 97 at 102. See also the decision of the Singapore Court of Appeal in *PacAsian Services Pte. Ltd. v. European Asian Bank AG* [1989] 3 MLJ 385 at p. 391. In the circumstances I ruled that the affidavit was admissible subject to payment of costs to the defendants. The defendants did not file any affidavit in reply to that affidavit.

The second defendant in his affidavit affirmed on behalf of himself and the first defendant averred that the plaintiff's allegations against the first and second defendants were contained only in paras. 2(a), 2(b) and 2(c) of the plaintiff's affidavit in support of the *ex parte* application. Paragraph 2(a) referred to the payment of RM6,000 to the firm of secretaries. Paragraph 2(b) referred to the payment of RM4,400 to Regent Intan Sdn. Bhd., being rent deposit for the first defendant's office Para. 2(c) referred to payment of RM2,240 for the purchase of office equipment for the first defendant. These payments were made by cheques. It was not denied that the cheques were the plaintiff's cheques dated 7 January 1985, 10 January 1985 and 18 January 1985 respectively. The second defendant claimed that these payments were made by the third defendant in his personal capacity. The fourth defendant, in his statement of defence and in his affidavit in support of his application stated that the payments referred to in paras. 2(a), 2(b) and 2(c) "were loans given to the first defendant at its request". The plaintiff contended that these payments were made before the first defendant was incorporated. In my view, the explanation that the payments were loans to the first defendant at its request is totally unacceptable.

The fourth defendant, in his affidavit in support of the second application denied that he induced Messrs. Thompson, Byron & Jackson to transfer the agency to the first defendant. On 28 January 1985 the fourth defendant wrote a letter to Messrs. Thompson, Byron & Jackson as follows:

> This is to confirm that we have no objections in you giving the reference agency to another company.
>
> In the midst of our expansion, we are yet to incorporate a pumping division and in order not to disrupt your continuity, we are prepared to surrender the following orders:
>
> (a) Petronas Dagangan Fire Fighting Pumps (AMTS PO No. 0017)

(b) Shell Malaysia Trading Sdn. Bhd. Single Suction Centrifugal Pump (AMTS PO No. 0019)

(c) Esso Malaysia Bhd. Spares for ESSO Port Dickson (AMTS PO No. 0020).

On the other hand, bids, quotations and tenders that are now being evaluated or processed by the various clients, we also surrender them.

All outstanding payments with you will be settled once we are in receipt from the respective Oil and Gas Companies.

It was a pleasure associating with your esteemed and renowned Pumping Company.

Yours faithfully,
Signed by Cheong Hok An
Cheong Hok An
Executive Director

With regard to the large sums of money received by the fourth defendant, the explanation was that these were payments for his director's fees, his salaries and his bonus. Article 76 of the articles of association of the plaintiff stated that:

The remuneration of the directors shall be such sum or sums as may be voted by the company in general meeting.

No minutes of the general meeting was exhibited by the fourth defendant to substantiate his explanation. I think the plaintiff's allegations that the payments were made to the fourth defendant without authority are probably true.

The question for the Court to consider now is whether the Mareva injunction should continue or be set aside. Having considered all the evidence and the submissions of both Counsel for the defendants and Counsel for the plaintiff, I am satisfied that the plaintiff has a good arguable case. There is evidence that the defendants have assets within jurisdiction. The defendants did not dispute receiving various cheques belonging to the plaintiff and signed by the third and fourth defendants. According to the plaintiff, a search at the Registry of Companies on the first defendant's company shows that the first defendant has a paid-up capital of RM100,000 of which RM60,000 registered with the second defendant's name and RM40,000 in the name of the third defendant. There is also evidence that the assets of the defendants will be removed before judgment is satisfied. In the plaintiff's affidavit, it is stated:

(l) further with information in my possession I verily believe that the defendants have dissipated and will further dissipate monies wrongfully taken out from the plaintiff company and further the defendants will proceed to transfer the assets and monies so wrongfully converted to others so as to take the monies out of the reach of the plaintiff.

(m) I verily believe that the 4th defendant in fact applied part of the monies misappropriated by him to repay The Chartered Bank loan taken on an assignment cum loan agreement in respect of Lot No. T1/2292 Taman Sri Muda, Shah Alam and the Receipt & Reassignment dated 14 March 1985 was forwarded to the plaintiff's address.

(n) I fear that the 2nd, 3rd and 4th defendants being in the possession of passports and travel documents issued to them and the actions of the defendants being Criminal Breaches of Trust, they may attempt to leave the country to avoid arrest and thereby frustrate the plaintiff's claim and recovery.

In my opinion the balance of convenience is in favour of continuing the Mareva injunction.

Paragraph (b) of the *ex parte* order is in fact a mandatory injunction and not an Anton Pillar

order as stated by Counsel for the defendants. From the evidence, the plaintiff has an unusually strong and clear case against the defendants. This is an exceptional case and I think the mandatory injunction too should continue until further order. See *Bank Islam Malaysia Bhd. v. Tinta Press Sdn. Bhd. & Ors.* [1986] 1 MLJ 256 and *Tinta Press Sdn. Bhd. v. Bank Islam Malaysia Bhd.* [1987] CLJ (Rep) 396.

For the reasons stated above, I dismiss both applications with costs.

Also found at [1991] 2 CLJ 982